

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF VIRGINIA  
3 Harrisonburg Division

4 UNITED STATES OF AMERICA, Criminal No. 5:14cr00019

5 vs. Roanoke, Virginia

6 GEORGE HENRY COVARRUBAIZ,

7 Defendant. September 29, 2014

8 TRANSCRIPT OF EXCERPT OF EVIDENTIARY HEARING  
9 BEFORE THE HONORABLE MICHAEL F. URBANSKI  
10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 For the United States:

13 U.S. Attorney's Offc.  
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24  
25 Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 THE COURT: Mr. Hoffman, good afternoon.  
2 Welcome to Roanoke.

3 MR. HOFFMAN: Good afternoon, Your Honor.  
4 Pleasure to be here. I've never been in here. I've  
5 never been in this courtroom. I was joking with the  
6 CSO, I think you could throw a 50-yard football pass and  
7 not hit anything. It's beautiful. It's good to be here  
8 and I want to thank the Court for entertaining our  
9 request to submit additional evidence early. I  
10 understand the Court's clerk advanced it. So, thank  
11 you.

12 Just to cut right to the Court's last  
13 question, Kithkart doesn't fit here, as the Court  
14 pointed out. There hasn't been a decision here yet.  
15 While the Court got close to its decision, the Court  
16 hasn't issued a decision yet. Therefore, there wasn't  
17 an appeal. There wasn't a remand.

18 I think one of the most important  
19 distinctions that no one has discussed here yet today is  
20 the fact that the government in that case didn't have an  
21 explanation. They never provided an explanation for why  
22 the additional evidence didn't go in. And they  
23 couldn't. I think that the circuit court concluded,  
24 well, there wasn't one, this is true gamesmanship.

25 I think the Court will see in our papers,

1 despite the timing -- I understand why the Court's  
2 antenna is up and I understand why the defense attorney  
3 used the word gamesmanship in its briefs, but I can  
4 assure the Court it's not. It's just a matter of  
5 timing, coincidental timing. The investigation was still  
6 ongoing at the time the motion to suppress was  
7 originally filed.

8 Defense counsel, Your Honor, is correct.  
9 The wire tap had been taken down at the time of our  
10 hearing. However, the criminal investigation was  
11 ongoing. Specifically, Mr. Everardo Amador had not been  
12 arrested yet. He was the primary domestic target of  
13 this nationwide investigation. So he was still out.

14 Our concern, and I appreciate defense's  
15 suggestion we could have done it in a closed hearing,  
16 our biggest concern was the defendant finding out  
17 because the defendant can make phone calls and before we  
18 know it, Everardo's back in Mexico. That was our  
19 biggest concern and that's why we decided we would just  
20 go forward on the defective light argument.

21 Again, I want to emphasize, we're sensitive  
22 to the timing issue. We're sensitive to the way it  
23 looks, but I can assure the Court, there's no  
24 gamesmanship going on. This is just how the timing  
25 worked out. He was arrested. We sat down, we made a

1 decision, put our brief together and we filed it.

2 THE COURT: What about the fact that  
3 information regarding Mr. Amador and the wire tap and  
4 all that was filed on the public record and could have  
5 been available for anyone with a computer and a Pacer  
6 account to get that and see all of that? Doesn't that  
7 sort of -- Mr. Cargill suggests that it causes your  
8 concern about the investigation safety of folks to sort  
9 of ring hollow.

10 MR. HOFFMAN: I can tell you this. I didn't  
11 know that. I didn't know that those were unsealed at  
12 the time we made these decisions. When Mr. Cargill  
13 pointed it out in his briefs, I investigated.

14 As the Court may have noticed in the brief,  
15 these were not handled in my district.

16 THE COURT: No. For some reason, they were  
17 handled in the Eastern District.

18 MR. HOFFMAN: Location of the search;  
19 location of the certain.

20 I knew that an application had been made,  
21 but that's all we knew. It wasn't until Mr. Cargill  
22 raised this in his papers that I investigated and  
23 learned, for some reason, and I do not know why, the  
24 Assistant U.S. Attorney in EDVA, who's not investigating  
25 this case -- not investigating this case, did not

1 request that that be sealed. That's the explanation.

2 Again, I understand how it could look, but  
3 two different departments, two different offices, one  
4 apparently not talking to the other. Didn't realize it  
5 wasn't sealed.

6 Additionally, I think I will point out, you  
7 know, a lack of a sealing order on an affidavit for a  
8 search warrant buried in EDVA is very different than  
9 revealing this information directly to the defendant --  
10 directly to the defendant. We're pretty confident the  
11 information would have gotten back to Mr. Amador. The  
12 defendant was an active member of his drug conspiracy  
13 that pushed heroin and cocaine across the United States,  
14 back and forth. That was our fear, our fear that he  
15 would be gone.

16 THE COURT: I appreciate that. What else  
17 would you like to say?

18 MR. HOFFMAN: Just two points.

19 I agree with defense counsel when he said  
20 the law is scant in the Fourth Circuit on this issue. I  
21 looked and looked and all I could really find was that  
22 since it is open, the Court has the discretion to  
23 entertain the evidence that it wants and to make a  
24 decision. That's what it comes down to. It's up to the  
25 Court.

1           THE COURT: I want to hear all the evidence  
2 today. I'm going to hear whatever evidence the parties  
3 want to put on, but I'm reserving the issue about  
4 whether or not -- I understand you brought people here  
5 from some distance; right?

6           MR. HOFFMAN: Yes, Your Honor.

7           THE COURT: They were already travelling by  
8 the time I heard about this.

9           To make a record, we'll put the evidence on,  
10 and I'm going to write an opinion, and then -- but I'm  
11 going to decide in that opinion whether I'm considering  
12 that evidence or not. Okay? I'm going to say, A, either  
13 I agree with Mr. Cargill's argument that this additional  
14 evidence as to this other reason should not have been  
15 put on and it shouldn't be reopened and I'm not  
16 considering it. Or I'm going to say the government has  
17 provided sufficient justification, I am going to  
18 consider it. But I thought since we're all here and you  
19 brought the folks, makes sense to put it all on. It's  
20 not like I have a jury here. I can decide whether I'm  
21 going to consider this evidence or not. That's what I  
22 planned to do. That's why when the law clerk called me  
23 on Saturday and said, what should they do, I said, have  
24 them come and we'll sort it out. It seems to me I can  
25 do that.

1 I need to do a little more research on this  
2 reopening issue. I also wanted to see what your  
3 justification was. I wanted to see what your story was  
4 with regard to this search warrant that was unsealed in  
5 the Eastern District and I also wanted to see what the  
6 nature of the evidence is. It very well may be -- I  
7 don't know. We'll have to see.

8 What do you anticipate putting on today?

9 MR. HOFFMAN: I anticipate putting on  
10 evidence through four witnesses. Witness number one,  
11 who is the young lady who came from California, she was  
12 the wire tap monitor supervisor.

13 THE COURT: Okay.

14 MR. HOFFMAN: Through her, we will introduce  
15 a sampling of some of the intercepted telephone calls.

16 Another witness we will call will be the  
17 case agent at the time. His name is Gregg Mervis.

18 This is the team, the investigation team  
19 that was working together before the stop.

20 THE COURT: Were they out of California?

21 MR. HOFFMAN: There were two teams. The  
22 interpreter was working with the team in California and  
23 then the remaining witnesses, Gregg Mervis, Paul  
24 Loconti, Trooper Miller, who testified last time, were  
25 here, based in Virginia, of course.

1 THE COURT: All right.

2 MR. HOFFMAN: We have a small hiccup I did  
3 want to advise the Court on. This morning -- our plan  
4 was to have five witnesses and the fifth witness was  
5 going to be a Virginia State Police, quote, expert, who  
6 was going to testify that the lights in question are  
7 indeed marker lights. I received a message from him  
8 this morning that he is sick and he can't make it. So I  
9 am prepared to --

10 THE COURT: So the evidence on the 1017  
11 issue is not available.

12 MR. HOFFMAN: Unless the Court is willing to  
13 accept it by proffer. Of course, I'm willing to proffer  
14 briefly what it would be. I'm not sure at this point if  
15 the Court would be willing to accept it.

16 THE COURT: You know, I've studied this  
17 issue about marker lights. You cite Ragland and Oddi in  
18 your brief for the proposition --

19 MR. HOFFMAN: I remember Oddi.

20 THE COURT: The thing about Oddi is you cite  
21 some of the text on -- at head note three -- Westlaw #3.  
22 It's at page two -- I'm sorry -- 350 and 351 of the  
23 Virginia App site. What you don't cite is the footnote  
24 and it's footnote five in Oddi. After reading all these  
25 cases -- there's a case about the mirror. There's a



1 case about the passenger mirror and what these cases  
2 seem to say, I don't think -- I went back and neither of  
3 you cited the Virginia Administrative Code. There is a  
4 set of regulations called the Virginia Administrative  
5 Code and Trooper Miller testified about it when he was  
6 here the last time because I couldn't find for the life  
7 of me where this 51 percent rule was on the LED lights.  
8 Remember, he said, if it's over 51 percent, then it's in  
9 violation. And he said I couldn't give him a ticket for  
10 it because there were more than 50 percent of the LED  
11 lights that were functional.

12 But we went back, although neither side  
13 really cited to it, we looked at the Virginia  
14 Administrative Code on this. There's another statute  
15 that says unless the lights are approved, you can't even  
16 have them on the truck. The Virginia Administrative  
17 Code talks about these LED lights and they say for those  
18 vehicles that are equipped with multiple LED lights,  
19 they will pass inspection if more than 50 percent of the  
20 diode lights are burning.

21 I go to Harrisonburg a lot, as you know, Mr.  
22 Hoffman, and I ride up and down the road and I've been  
23 looking at every truck that passes me as I ride up and  
24 down the road to Harrisonburg --

25 MR. HOFFMAN: All three of us probably do at

1     this point.

2                 THE COURT: -- and seeing which one of these  
3     cars and trucks have lights and which one doesn't.

4                 These are optional lights. I think Trooper  
5     Miller testified there's a switch in the cab. You can  
6     turn them on, you can turn them off. They're optional  
7     lights. I think footnote five in Oddi, the Virginia  
8     Court of Appeals decision, says only devices and  
9     equipment mentioned in 46.2-1002 are required to be kept  
10    in non-defective condition, under 1003. As a result,  
11    assuming that some non-functioning optional equipment  
12    would cause a vehicle to fail state inspection --  
13    because these regs, these Virginia administrative  
14    regulations go to whether or not it passes state  
15    inspection. That's what it goes to. That's where that  
16    51 percent goes. It won't pass state inspection if more  
17    than 51 percent of those little diodes are out. Anyway,  
18    as a result, assuming that some non-functioning optional  
19    equipment would cause a vehicle to fail state  
20    inspection, such defective optional equipment would not  
21    justify a stop under 46.2-1003.

22                So the 1003 issue is dead. It is decided --  
23    until the Fourth Circuit tells me I'm wrong, the 1003  
24    issue is dead. I'm glad I finally got to the end of the  
25    road as to how these lights are allowed on trucks and

1 they're allowed on trucks under the Virginia  
2 regulations. The regulations say what will pass  
3 inspection and what won't pass inspection. But it's not  
4 a violation of law for which you can get a ticket, even  
5 though many state courts, I understand, may have  
6 affirmed convictions on them. It's not a violation of  
7 law under 1003 to have these little side lights that he  
8 testified about being out.

9           So, it takes us back to the question as to  
10 whether this round amber light he testified about and  
11 these diode lights he testified about were, in fact,  
12 marker lights.

13           In looking at that, the way I read the  
14 statute and the way I look at it, marker lights on a  
15 trailer have to be red lights up in each corner of the  
16 back and three across the top. Then on the -- on a  
17 tractor, they have to be two amber lights on the front.  
18 What they do is they show the dimension of the vehicle.

19           I really don't think these are marker  
20 lights. I'm going to -- unless you've got further  
21 evidence on that issue here today --

22           MR. HOFFMAN: Not today, we don't.

23           THE COURT: I do not believe these are  
24 marker lights. I've tried to look at everything and I  
25 really think the Virginia Court of Appeals, although

1 some of the decisions sort of weave in and out, the  
2 notion of inspection versus required and safety, I  
3 really think this Oddi case and the case about the  
4 mirror makes it clear that if it's not required under  
5 1002 -- and these are not -- then optional lights do not  
6 provide a basis for stop under 1003.

7 The officer testified -- and I assume he's  
8 not testifying today.

9 MR. HOFFMAN: He's here today.

10 THE COURT: What could he possibly testify  
11 to? Do you intend to call him?

12 MR. HOFFMAN: I do.

13 THE COURT: For what purpose?

14 MR. HOFFMAN: He was going to provide and  
15 I'm -- in light of the Court's explanation that you're  
16 going to entertain testimony today, I might not call him  
17 -- actually, I am. A couple of things. He needs to  
18 testify, one, under the collective knowledge doctrine,  
19 his receipt from the instructing officer to make the  
20 stop, which is the required portion under the collective  
21 knowledge doctrine.

22 THE COURT: But he already testified that  
23 the reason for the stop was for 1003 and that was the  
24 sole reason.

25 MR. HOFFMAN: He testified differently on

1 page 26 of the transcript. So I think -- Your Honor,  
2 I'm going to defer to his testimony --

3 THE COURT: All he said there -- I got it.  
4 I read it this morning. He never said that he was  
5 instructed to stop this vehicle. He said, I was  
6 informed that there was a truck possibly transporting  
7 narcotics, a blue truck. That's what he says.

8 MR. HOFFMAN: Correct. And I would ask the  
9 Court to simply entertain his testimony, to hear him,  
10 hear his explanation for his testimony and to bear in  
11 mind that at this time, all members of the law  
12 enforcement team were -- it was a high wire act. They  
13 were trying to do their jobs here, answer questions and  
14 present evidence of the stop while at the same time not  
15 disclosing that there's a bigger investigation that  
16 would alert the main target in Southern California and  
17 cause his flight.

18 I understand why the Court feels his  
19 testimony may be limited. I would ask the Court to --  
20 and if the Court wants to examine the witness itself,  
21 the Court certainly could. But Trooper Miller will  
22 testify that he was instructed. He received  
23 instructions. The other witnesses --

24 THE COURT: How is that consistent with his  
25 testimony on cross-examination that the sole reason for

1 the stop was the 1003 violation? That's what he says.

2 MR. HOFFMAN: I understand, Your Honor. I  
3 think it's best if -- I don't want to speak on his  
4 behalf. I think --

5 THE COURT: It's your decision whether to  
6 put that testimony on or not.

7 MR. HOFFMAN: It is, Your Honor, and we've  
8 discussed it. I've discussed it with the trooper. He  
9 does have an explanation and he does want to put it on.

10 Your Honor, I will also emphasize before we  
11 start that his testimony, that he received instructions  
12 to conduct the stop, will be corroborated by other  
13 individuals who were at the meeting when they all  
14 discussed what was going to happen and the instruction  
15 was issued. You have the collective knowledge doctrine  
16 and the instructions from the officer who did the stop.  
17 It fits very neatly into the --

18 THE COURT: That's spackle on a crack in the  
19 wall.

20 MR. HOFFMAN: This is why I started, Your  
21 Honor, with saying I understand. But again, I'll remind  
22 the Court, the Court has not made a decision yet.  
23 There's no appeal, no remand and with the timing, again,  
24 Your Honor, I'd ask the Court to bear in mind that the  
25 opportunity that we had to introduce this evidence, the

1 big target was still out. If we introduced it, great  
2 chance the message would get back to him and he'd be  
3 gone. That was the strategic decision we made at the  
4 time and we appreciated the risks at the time. After he  
5 was arrested, we decided to present the additional  
6 evidence.

7 Out of fairness to both parties, the  
8 government would implore the Court to please consider  
9 the additional evidence.

10 That's all we've got by way of opening  
11 remarks. If the Court has any questions or I can just  
12 call our first witness.

13 THE COURT: I want to hear from Mr. Cargill.  
14 Thank you, Mr. Hoffman.

15 (Further proceedings had, but not  
16 transcribed at this juncture).

17 MR. HOFFMAN: Your Honor, we call Trooper  
18 Miller.

19 JOSEPH MILLER, CALLED AS A WITNESS BY, THE GOVERNMENT,  
20 SWORN

21 THE COURT: Nice to see you again.

22 THE WITNESS: Yes, sir, you, too.

23 DIRECT EXAMINATION

24 BY MR. HOFFMAN:

25 Q. Trooper Miller, just for the record, please

1 reintroduce yourself to the Court.

2 A. Trooper Joseph Keith Miller.

3 Q. You work for Virginia State Police.

4 A. Yes, sir.

5 Q. You're a senior trooper?

6 A. Yes, sir.

7 Q. You've been with the state police for about 13  
8 years?

9 A. Yes, sir.

10 Q. At one point, you were just a regular trooper;  
11 correct?

12 A. Correct.

13 Q. For about nine years.

14 A. Correct.

15 Q. Let's go back into this case. If I may, your  
16 involvement was, you were the trooper, as you testified  
17 before, who conducted the stop of the defendant's  
18 vehicle on February 3, 2014; correct?

19 A. Yes, sir.

20 Q. Did you attend any meetings with other law  
21 enforcement agencies prior to that stop?

22 A. Yes, sir, I did.

23 Q. Do you recall the date of that meeting?

24 A. Yes, sir.

25 Q. What was it?



1 A. It was February 3, 2014.

2 Q. Do you recall the location?

3 A. I believe it was at the Hampton Inn, in  
4 Harrisonburg, at a hotel.

5 Q. Do you recall the approximate time?

6 A. I think it was approximately around four o'clock  
7 in the morning.

8 Q. Do you recall who attended the meeting?

9 A. It was myself; my sergeant, Kevin Warzinski;  
10 Special Agent Jimmy Akins; Trooper Jerry Moore; Trooper  
11 Andy Fisher; and several of the DEA agents involved in  
12 this case.

13 Q. And did the DEA agents communicate information to  
14 you and members of your team?

15 A. They did.

16 Q. Do you recall what was communicated to you?

17 A. They provided us with a description of a tractor  
18 trailer that was supposed to be coming northbound and  
19 information we were provided was it was supposed to be  
20 carrying a large quantity of narcotics. They also had  
21 advised us that they had a wire tap on the  
22 investigation.

23 Q. Was there any reference during the meeting to the  
24 other stop of the defendant in which you were involved  
25 that you recall?

1 A. Not that I recall.

2 Q. And did the DEA agents ask you during this  
3 meeting to do anything?

4 A. They asked me to make a stop on the vehicle. It  
5 was also discussed along with our, the members of my  
6 department, who is going to make the stop. It was  
7 determined since I made the previous stop back in  
8 December that I would make this stop.

9 Q. Was there discussion about the type of stop that  
10 you should conduct?

11 A. My understanding was it was to be a directed  
12 stop.

13 Q. A what?

14 A. A directed stop.

15 Q. What does that mean?

16 A. Basically, the information provided to us from  
17 law enforcement to make a stop on the vehicle.

18 Q. And was there a discussion about probable cause  
19 at the meeting?

20 THE COURT: Did you talk about this directed  
21 stop issue before you came into this courtroom today?

22 THE WITNESS: I'm sorry, Your Honor?

23 THE COURT: Did you talk about this directed  
24 stop issue before you came into this courtroom today?

25 THE WITNESS: Yes, sir.

1 THE COURT: Who did you talk to about it?

2 THE WITNESS: Special Agent Cutting.

3 THE COURT: When did you talk to him about  
4 it?

5 THE WITNESS: During that meeting at the  
6 Hampton Inn.

7 THE COURT: Did you talk to any of these  
8 other agents or the prosecutor about this directed stop  
9 idea?

10 THE WITNESS: No, sir.

11 THE COURT: You didn't talk to them this  
12 morning?

13 THE WITNESS: No, sir.

14 THE COURT: You didn't talk to them  
15 yesterday?

16 THE WITNESS: No, sir.

17 THE COURT: You didn't talk to them out in  
18 the hallway about it?

19 THE WITNESS: No, sir.

20 THE COURT: Do you remember testifying in  
21 this case?

22 THE WITNESS: Yes, sir, I do.

23 THE COURT: Do you remember testifying at  
24 all, anything about a directed stop at that time?

25 THE WITNESS: No, sir.

1 THE COURT: I don't think you did.

2 Do you remember testifying in response to a  
3 question from Mr. Cargill that the sole probable cause  
4 for this stop was the 1003 violation, the lights?

5 THE WITNESS: Yes, sir.

6 THE COURT: Remember we sat there for hours  
7 talking about lights?

8 THE WITNESS: Yes, sir.

9 THE COURT: Did you ever mention for one  
10 second during that hearing that this was a directed  
11 stop?

12 THE WITNESS: My understanding was --

13 THE COURT: Did you ever mention for one  
14 second that it was a directed stop?

15 THE WITNESS: No, sir.

16 THE COURT: And now you come into this  
17 courtroom and say that it was; is that right?

18 THE WITNESS: No, sir, that's not what I'm  
19 --

20 THE COURT: Is that what you're saying?

21 MR. HOFFMAN: Your Honor, may I show him a  
22 copy of the transcript?

23 THE COURT: You may ask him whatever  
24 questions you want in a minute.

25 You didn't say a word about directed stop at

1     that time, did you?

2                   THE WITNESS:   No, sir.

3                   THE COURT:    I think you said on page 26 of  
4     the transcript that you had gotten word that there was a  
5     suspected large quantity of narcotics coming into  
6     Virginia; right?

7                   THE WITNESS:   Yes, sir.

8                   THE COURT:    And then you said you stopped  
9     him because of the lights; right?

10                  THE WITNESS:   Yes, sir.

11                  Mr. Cargill, the conversation that I recall  
12     that I think you're talking about --

13                  THE COURT:    Didn't we talk about lights for  
14     about two hours?

15                  THE WITNESS:   Yes, sir, we did.

16                  THE COURT:    Wasn't there some question you  
17     weren't certain which side of the truck these lights  
18     that you supposedly saw were on or off? Remember, we  
19     were all standing around the podium and we couldn't  
20     figure out whether it was the passenger side or the  
21     driver's side?

22                  THE WITNESS:   Yes, sir.

23                  THE COURT:    Did you talk that night about a  
24     meeting with DEA?

25                  THE WITNESS:   No, sir.

1 THE COURT: Did you talk at your last  
2 hearing about a meeting with DEA?

3 THE WITNESS: No, sir.

4 THE COURT: Did you talk about DEA directing  
5 the stop?

6 THE WITNESS: No, sir.

7 THE COURT: Go ahead, Mr. Hoffman.

8 MR. HOFFMAN: Thank you, Your Honor.

9 THE COURT: In fact, it was only after I  
10 wrote the opinion in this case in which I put in a  
11 footnote on page one of that opinion that this whole  
12 issue of a directed stop came up; isn't that right?

13 You understand you're under oath?

14 THE WITNESS: Yes, sir.

15 THE COURT: Go ahead, Mr. Hoffman.

16 BY MR. HOFFMAN:

17 Q. Trooper Miller, I'm going to show you your  
18 transcript from before.

19 A. Yes, sir.

20 Q. This is page 26.

21 "Question: Let me interrupt you. Before  
22 you observed the vehicle coming, did you receive any  
23 other information from law enforcement that day?

24 "Answer: Yes, sir, I did.

25 "What did you receive?"

1                   Your answer is, "I received information that  
2   the vehicle could possibly be transporting a large  
3   quantity of narcotics."

4                   Did I read that correctly?

5           A.   Yes, sir.

6           Q.   What information were you referring to at that  
7   time? You received information that the vehicle could be  
8   transporting a large quantity of narcotics. What  
9   information were you referring to?

10          A.   To the meeting we had had that morning.

11          Q.   The meeting you had just had?

12          A.   Yes, sir.

13          Q.   Now I'd like to go to the part the Court was just  
14   asking you about of the transcript. I believe it's on  
15   page 72.

16                   THE COURT: Bottom of 71, top of 72.

17                   MR. HOFFMAN: Thank you, Your Honor.

18   BY MR. HOFFMAN:

19          Q.   Mr. Cargill says, the only reason -- he's asking,  
20   the very beginning of your cross-examination, the only  
21   reason that you stopped Mr. Covarrubaiz was because of  
22   these defective lights; correct? You say, correct.  
23   That's the sole reason you stopped him. And your answer  
24   was "correct."

25          A.   Yes, sir.

1 Q. Why was that your answer? Please explain that to  
2 the Court.

3 A. I believed that the defense was asking me just  
4 about the traffic infraction, not about the other  
5 information coupled with the traffic stop. I thought  
6 the defense attorney was asking me solely the only  
7 reason you stopped the vehicle, the tractor trailer, was  
8 just for the traffic violation, just the lights being  
9 out. I didn't think he was asking me was that the only  
10 reason, meaning that that was the only reason not based  
11 on the information, not the totality of everything that  
12 I knew. I thought he was just referring to the traffic  
13 stop itself, just the traffic violation since that's the  
14 only violation that I actually stopped him for, was for  
15 the lights.

16 THE COURT: But the question was, the sole  
17 reason you stopped him was for the 1003 violation.

18 THE WITNESS: Correct, and that's the way I  
19 interpreted it.

20 THE COURT: You're telling me now that's not  
21 true.

22 THE WITNESS: It was a -- the information  
23 that I was provided with in the morning was that DEA  
24 wanted us to conduct a directed stop.

25 THE COURT: Let me ask you this -- I'm



1       sorry.   Go ahead and finish your answer.

2               THE WITNESS:   Our practice or my practice  
3       is, and our team, that if we can find a legal traffic  
4       violation, to find our own reasonable suspicion or  
5       probable cause that we'll try to do that, incorporate it  
6       into the other information that we have.

7               THE COURT:   Did you think on February 3 that  
8       based on those LED lights and amber lights that you saw  
9       that weren't working, did you think that you had  
10      reasonable articulable suspicion?

11              THE WITNESS:   Yes, sir.

12              THE COURT:   To do the stop.   I understand  
13      what the DEA agents told you.

14              THE WITNESS:   Just for the traffic?

15              THE COURT:   Yeah, just for the traffic  
16      infraction.

17              THE WITNESS:   Yes, sir.

18              THE COURT:   And you thought you did.

19              THE WITNESS:   Yes, sir. I've made numerous  
20      stops on 81 for the exact same violation.

21              THE COURT:   Go ahead, Mr. Hoffman.

22      BY MR. HOFFMAN:

23              Q.   That day --

24              THE COURT:   Was it your understanding -- did  
25      anybody from the DEA tell you, look, y'all go ahead and

1 try to establish probable cause on your own? Did that  
2 issue come up in that meeting?

3 THE WITNESS: Yes, sir.

4 THE COURT: What was said, if you will,  
5 Trooper Miller?

6 THE WITNESS: If I recall, I asked Cutting,  
7 who is the actual -- who I thought was the actual case  
8 agent in this case, if they wanted us to, in fact, do  
9 the directed stop and if I could provide my own  
10 reasonable suspicion or probable cause to stop the  
11 truck, if he wanted me to do that instead of the  
12 directed stop. That way, they didn't have to provide  
13 the information for the directed stop later. It was my  
14 understanding they wanted us to, if we could, find our  
15 own reasonable suspicion or probable cause to stop the  
16 tractor trailer.

17 THE COURT: That's, in fact, what you  
18 thought you did.

19 THE WITNESS: Yes, sir.

20 THE COURT: That's why you answered the  
21 question from Mr. Cargill that way.

22 THE WITNESS: Correct.

23 THE COURT: You thought when you pulled over  
24 Covarrubaiz, just as you had done in December, that  
25 those lights provided you with sufficient probable cause

1 to do that; right?

2 THE WITNESS: Yes, sir.

3 THE COURT: In fact, you were acting that  
4 morning when you pulled him over on your own probable  
5 cause based on the lights; correct?

6 THE WITNESS: Correct.

7 THE COURT: You weren't acting pursuant to  
8 that direction, were you?

9 THE WITNESS: No, sir.

10 THE COURT: Did you read my opinion where I  
11 said I thought there wasn't probable cause to -- based  
12 on my reading of 1002?

13 THE WITNESS: Actually, Your Honor, I've  
14 never even seen the opinion.

15 THE COURT: All right.

16 He might not agree with it, but that's for  
17 another day.

18 THE WITNESS: I've honestly never even seen  
19 the opinion that came out.

20 BY MR. HOFFMAN:

21 Q. Trooper Miller, let me just clarify something you  
22 just said. Let me ask you this. Would you have made the  
23 stop if you hadn't attended that meeting? Would you have  
24 known to go and stop that car if you had not attended  
25 the meeting at the hotel?

1           A.    No, sir.

2                   THE COURT:   Had you seen him -- had you been  
3 driving -- I think you were driving an unmarked car.

4                   THE WITNESS:   Correct.

5                   THE COURT:   You were driving along and you  
6 said you stopped people for these kind of lights all the  
7 time.  Had you seen those lights, would you have made  
8 the stop, not knowing anything else about this meeting  
9 or this drug activity?

10                  THE WITNESS:   Yes, sir.

11                  THE COURT:   Because those lights were not  
12 functioning.

13                  THE WITNESS:   Correct.

14                  Like I say, prior, I've made numerous stops  
15 for the exact same violation in numerous times and been  
16 upheld in state court.

17                  THE COURT:   You've issued citations.  You've  
18 had state courts enter judgment based on that.

19                  THE WITNESS:   Yes, sir.

20                  THE COURT:   I went back and looked.  When  
21 you testified last time, I went back and looked at the  
22 Virginia regulations on these lights because I remember  
23 you telling me that you couldn't give him a citation in  
24 this case because it was more than 51 percent of the  
25 lights.

1 THE WITNESS: Operational.

2 THE COURT: And that was in the regulations  
3 that say you can't pass inspection if more than 51  
4 percent of those little LED diodes aren't working.

5 THE WITNESS: Correct.

6 BY MR. HOFFMAN:

7 Q. Trooper Miller, I want the record to be very  
8 clear. Separate and apart from your stopping him, the  
9 defendant, for the defective lights, what you perceived  
10 to be a traffic violation, the other basis, the other  
11 reason you were there was because DEA requested the  
12 assistance of Virginia State Police to conduct that  
13 specific stop; is that correct?

14 A. Yes, sir.

15 THE COURT: That's why they had the meeting.  
16 That's why you were all gathered at three in the  
17 morning.

18 THE WITNESS: Yes, sir.

19 THE COURT: You weren't there randomly  
20 sitting at that interstate stop. You were placed there  
21 by the DEA; is that right?

22 THE WITNESS: I wasn't specifically told  
23 where to sit. That's where I chose to sit, but I was  
24 told to --

25 THE COURT: But your team was contacted by

1     DEA. All you guys, you and Agent Warzinski and Jerry  
2     Moore and Andy Fisher and all the other folks had been  
3     brought in for the purpose of contacting this truck;  
4     right?

5                     THE WITNESS: Yes, sir.

6                     THE COURT: And you're told at this meeting  
7     that if you can go ahead and establish probable cause  
8     and do your own stop, do that; right?

9                     THE WITNESS: Correct.

10                    THE COURT: You thought you had done that  
11     and that's what you did.

12                    THE WITNESS: Correct, yes, sir.

13                    THE COURT: That's why you answered the  
14     question of Mr. Cargill the way you did last time. As  
15     far as you're concerned, the sole reason you stopped him  
16     was because of the 1003 violation.

17                    THE WITNESS: Correct, yes, sir.

18     BY MR. HOFFMAN:

19             Q. Finally, when you were testifying that day on  
20     July 17, 2014, this transcript you just reviewed, were  
21     you answering the questions as best and as accurately  
22     and as truthfully as you could?

23             A. Correct.

24                    MR. HOFFMAN: Thank you, Your Honor.

25                    THE COURT: Mr. Cargill?

1 CROSS-EXAMINATION

2 BY MR. CARGILL:

3 Q. Good afternoon, sir.

4 A. Good afternoon.

5 Q. When you testified in July of 2014, you raised  
6 your right hand. You swore to tell the truth?

7 A. Correct.

8 Q. The whole truth?

9 A. Correct.

10 Q. The whole truth?

11 A. Correct.

12 Q. What does that mean to you?

13 A. To tell the truth.

14 Q. What does the whole truth mean?

15 A. To tell the truth.

16 Q. Everything; right?

17 A. Yes, sir.

18 Q. So, I asked you, as you've been asked already --  
19 let me just see if I'm clear about this, to begin with.  
20 The only reason you stopped Mr. Covarrubaiz was because  
21 of these defective lights; correct? And you answered  
22 correct, under oath?

23 A. Yes.

24 Q. Was that the whole truth?

25 A. That question that you just asked me is exactly

1 what I explained to the judge when he asked. I thought  
2 that day that you were asking specifically about the  
3 traffic violation.

4 Q. Was that the whole truth?

5 A. My opinion, that's the question you were asking,  
6 that's the way I answered.

7 Q. So your belief is you told the whole truth then.

8 A. Yes.

9 Q. And then when I followed up and asked, so that's  
10 the sole reason you stopped him, you said correct.

11 A. Correct.

12 Q. That again is the whole truth.

13 A. Again, the way you asked the question is the way  
14 I answered.

15 Q. This is my fault for asking the question that  
16 way? This is my fault? What could I have asked you that  
17 would have elicited this information that it was a  
18 directed stop, that you were directed to stop him? What  
19 could I have asked you?

20 A. If it was a directed stop.

21 Q. Was it a directed stop?

22 A. I was there solely initially for a directed stop.

23 Q. Did you not just testify to the judge that  
24 despite what directions you were given, you were  
25 stopping him only for this reason?



1       A. I did develop my own probable cause and  
2 reasonable suspicion to stop him.

3       Q. So this was not a directed stop.

4       A. This was a traffic infraction is the reason I  
5 stopped him.

6       Q. You were not acting pursuant to whatever  
7 instruction or directions you had been given by anyone,  
8 were you?

9       A. I think I was doing both.

10      Q. You were doing both, yet you told us the sole  
11 reason was for the traffic violation?

12      A. Again, on the question you asked that day, that's  
13 why I responded the way I did.

14      Q. Right, right. Let me go back to earlier in your  
15 testimony, and I'm on page 36. This is in response to  
16 someone else's questions, not mine. You were asked,  
17 quote, I think you briefly testified about this a moment  
18 ago, but based on your observations, it appears that he  
19 also has the exact same lights out as from the previous  
20 stop; correct? Yes, sir.

21           Then the question was, at this point, and this  
22 was after you saw the bill of lading and the religious  
23 items in the cab of the truck, at this point, has the  
24 scope of your investigation expanded beyond defective  
25 equipment? Your answer was, yes, sir.

1 Do you remember that?

2 A. Yes, sir.

3 Q. What did you mean by that?

4 A. That based on the driver's behavior, having the  
5 bill of lading, all the things that I saw that day on  
6 the traffic stop, that I had also, along with the  
7 information that I had, that I should call K-9 and along  
8 with the K-9 alert, we had more.

9 Q. So that's when it turned into a drug  
10 investigation.

11 A. No, sir.

12 Q. When did it turn into a drug investigation?

13 A. It was a drug investigation from the moment that  
14 DEA called us to do the directed stop.

15 Q. From the very start, right?

16 A. It was their drug investigation.

17 Q. And yet, you never revealed this, that it was a  
18 drug investigation from the very start, a directed drug  
19 investigation from the very start, when you testified in  
20 July, did you?

21 A. I guess not, no, sir.

22 Q. Now, the judge touched upon this, but --

23 THE COURT: Back then, in July, was anybody  
24 telling you to stay away from that topic, to not mention  
25 the directed stop? Was anybody saying don't go there,

1 just talk about your probable cause?

2 THE WITNESS: No, sir.

3 BY MR. CARGILL:

4 Q. You didn't have a meeting with the prosecutor or  
5 any of the DEA agents or the task force officers where  
6 you discussed whether you should mention the wire tap  
7 information and the directed stop? Never discussed that  
8 with anybody?

9 A. I actually didn't even have any information other  
10 than DEA had a wire tap. I never personally saw any of  
11 the transcripts or any of the information involved with  
12 the wire tap.

13 Q. So all they told you is this is a truck going  
14 down the highway, possibly transporting narcotics?

15 A. Yes.

16 Q. That's it?

17 A. Yes.

18 Q. Same truck that you stopped in December and that  
19 you searched and found nothing.

20 A. Yes.

21 Q. Did you mention in any of your reports that you  
22 prepared that this was a directed stop, that you had  
23 been directed to stop?

24 A. Not a directed stop, only that there was  
25 information provided from the DEA.

1 Q. But no mention that anyone had directed you to  
2 stop Mr. Covarrubaiz.

3 A. No, sir.

4 Q. Now, between the July hearing and this hearing  
5 today, did you talk to anybody about this whole directed  
6 stop issue and this meeting you had at the Hampton Inn?

7 A. No, sir.

8 Q. You didn't speak to the prosecutor even?

9 A. I spoke to the prosecutor, but just the questions  
10 he asked me.

11 Q. What were those?

12 A. Basically, he asked me what was said with Agent  
13 Cutting and basically what I testified to just earlier.

14 Q. Did he mention to you that this whole issue had  
15 arisen and that it was important that you discuss this  
16 being a directed stop?

17 A. No, sir. He only --

18 Q. Pardon me?

19 A. No, sir.

20 Q. No mention of directed stop when you met with the  
21 prosecutor?

22 A. I mentioned to him that when I met with the DEA  
23 agents that morning that they wanted us to conduct a  
24 directed stop. However, I made my own reasonable  
25 suspicion and probable cause for the defective lights.

1 Q. What prompted you to say that to the prosecutor?

2 A. Because that's what happened.

3 Q. What prompted you to tell the prosecutor that?

4 A. Because that's what happened.

5 Q. What did he ask you that prompted you to answer  
6 that question in that way, to say it was a directed  
7 stop?

8 A. Because that's what happened, so that's why I  
9 told him.

10 Q. I'm asking you, what did he ask you? How did he  
11 pose the question to you to cause you to mention that it  
12 was a directed stop?

13 A. I honestly don't remember the questions he asked  
14 me, specifically. I can't sit here and tell you what  
15 exact questions he asked me.

16 Q. Did he ask you what was the reason for the stop?

17 A. Yes, which I just testified to.

18 Q. And you said it was a directed stop.

19 A. Correct.

20 Q. And you said that to the prosecutor.

21 A. Correct.

22 Q. Yet, when I asked you whether your sole basis for  
23 the stop was the defective lights, you answered yes.

24 A. Yes, because the day that you asked me --

25 Q. You answer one question one way when I'm asking

1 it and another way because the prosecutor's asking it.

2 Is that true?

3 A. No, sir. I think it's just the question that  
4 you're asking.

5 Q. Aren't we all entitled to the whole truth? Aren't  
6 we all entitled to the whole truth? This Court, me, even  
7 little old me, and the prosecutor? Aren't we all  
8 entitled to your whole truth?

9 A. And I've provided the truth.

10 Q. On July --

11 THE COURT: But you didn't tell us anything  
12 about a meeting with the DEA on the morning of February  
13 3 and you didn't tell us anything about that back then  
14 because if you had done that, we may not have had to  
15 spend the last five hours here in Roanoke and had to  
16 bring you down here for this. You didn't say a word  
17 about that and I'm really troubled by it. I really am.  
18 BY MR. CARGILL:

19 Q. Trooper Miller, you also testified, I think, in  
20 response just now to the judge's questions that in fact,  
21 these lights were in compliance with state law because  
22 at least 51 percent of the diode bulbs were lit;  
23 correct?

24 A. In reference to the LEDs, I believe the majority  
25 of those were operational.

1 Q. Therefore, there was no reason to give him a  
2 defective equipment citation; right?

3 A. The yellow amber lights were actually defective.

4 Q. So that's why you gave him a defective equipment  
5 citation?

6 A. Right. I could not issue him a citation for the  
7 LEDs because of the way the manual and code is written.  
8 51 percent have to be not operational before you can  
9 write a citation.

10 Q. Let me close with this. What question should I  
11 have asked you in order to elicit from you that you had  
12 this meeting at the Hampton Inn on February 3 where you  
13 were directed to stop Mr. Covarrubaiz's truck?

14 A. That, I can't answer, sir.

15 MR. CARGILL: Thank you, sir.

16 THE COURT: Mr. Hoffman?

17 REDIRECT EXAMINATION

18 BY MR. HOFFMAN:

19 Q. Trooper Miller, during the last hearing, did  
20 anyone ever ask you, did I, Mr. Cargill or the Court ask  
21 you if you had a meeting at the hotel, a meeting with  
22 the DEA prior to the stop?

23 A. No, not that I recall.

24 Q. Did anyone ask you if you had ever received  
25 instructions from another agency to conduct the stop?

1 A. During the hearing? Not that --

2 Q. During the hearing.

3 A. Not that I recall.

4 Q. Again, did you tell the truth that day, back in  
5 July of this year, 2014, to the best of your ability as  
6 you were sitting in that chair that day?

7 A. Yes, sir.

8 Q. Based on the questions that you were asked.

9 A. Yes, sir.

10 MR. HOFFMAN: Thank you, Your Honor.  
11 Nothing more.

12 THE COURT: Are you aware of footnote five  
13 in the case of Oddi vs. Commonwealth, 61 Virginia Court  
14 or Appeals 346, decided by the Virginia Court of  
15 Appeals -- I'm asking you -- on December 26, 2012, that  
16 says the following. This is a case involving brake  
17 lights. Only devices and equipment mentioned in  
18 46.2-1002 are required to be kept in non-defective  
19 condition under Code Section 46.2-1003. As a result,  
20 assuming that some non-functioning optional equipment  
21 would cause a vehicle to fail state inspection, such  
22 defective optional equipment would not justify a stop  
23 under Code Section 46.2-1003.

24 Were you aware that that was the law in  
25 Virginia at the time you engaged in this stop?



1 THE WITNESS: No, sir. And it's my  
2 understanding if there is a light with a wire attached  
3 to it, and a bulb, then it has to be operational.

4 THE COURT: I think if you read the cases, I  
5 think you'll find that may be true for inspection  
6 purposes, but not to justify a stop under the Fourth  
7 Amendment of the U.S. Constitution.

8 So you might want to get your supervisor to  
9 look at Oddi vs. Commonwealth, footnote five.

10 THE WITNESS: Yes, sir.

11 THE COURT: Any other questions for this  
12 witness?

13 MR. HOFFMAN: None from the government, Your  
14 Honor.

15 THE COURT: Thank you, Trooper Miller.

16 (Conclusion of requested excerpt).  
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"I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled  
matter.

/s/ Sonia Ferris

October 3, 2014"